



NEW SOUTH WALES  
BAR ASSOCIATION

## The Disclosure Obligations of Barristers

As the holder of a practising certificate in New South Wales, barristers have disclosure obligations under the *Legal Profession Uniform Law (NSW) (LPUL)*, *Legal Profession Uniform Law Application Act 2014 (NSW)*, and associated regulations. This fact sheet deals generally with the various heads of disclosure obligations and the consequences of non-disclosure with respect to fees in advance, show cause events (automatic and designated), section 51 of the LPUL, and renewal.

A CPD seminar was given on 21 March 2018 by Mr Tim Game SC and Mr Edward Muston SC on this topic, titled '*What matters do I need to disclose to the Bar Council, and when?*'. It is accessible via the NSW Bar Association website's CPD streaming.<sup>1</sup>

### Fees in Advance Disclosures

A barrister who opens a trust money account for the purpose of receiving fees in advance in direct access matters must notify the NSW Bar Association of certain particulars of the account within 14 days of opening the account, pursuant to clause 15 of the *Legal Profession Uniform Law Application Regulation 2015 (NSW) (Application Regulation)*.

These particulars include providing written notice to the NSW Bar Association of the following within 14 days of opening the trust money account:

- a) the name of the authorised deposit-taking institutions with which the trust money account has been opened;
- b) the date on which the trust money account was opened; and
- c) the account number of the trust money account.

Under clause 15(2)(h) of the Application Regulation, barristers with trust money accounts must also provide to the NSW Bar Association each year an External Examiner's report (in the form approved annually by the Bar Council), not later than 7 June, following the end of the reporting period, being 1 April to 31 March.

More information on this topic is available on the NSW Bar Association's website under 'Costs and Fees'. There is a specific fact sheet on fees in advance on the NSW Bar Association website.<sup>2</sup>

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<sup>1</sup> The CPD link is accessible at: <https://cpd-streaming.nswbar.asn.au/search?q=disclosure+obligations>

<sup>2</sup> The fees in advance factsheet link is accessible at: <https://nswbar.asn.au/practice-support/costs-billing/fees-in-advance>

## Show Cause Event Disclosures

### Automatic Show Cause Event

An automatic show cause event is defined under section 86 of the LPUL as:

- a bankruptcy-related event; or
- a conviction (which includes entering a plea of guilty, whether or not a conviction is recorded) for a serious offence or a tax offence, whether or not:
  - the offence was committed while the barrister was engaging in legal practice as an Australian legal practitioner or was practising foreign law as an Australian-registered foreign lawyer; or
  - other persons are prohibited from disclosing the identity of the offender; and
  - an event of a kind specified in the Uniform Rules for the purposes of this section.

A 'bankruptcy-related event' is defined under section 6 of the LPUL as:

- a barrister becoming bankrupt under the Bankruptcy Act (or the corresponding provisions of the law of a foreign country or external territory);
- a barrister being served with notice of a creditor's petition presented to a court under section 43 of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**);
- a barrister's presentation (as a debtor) of a declaration to the Official Receiver under section 54A of the Bankruptcy Act of the barrister's intention to present a debtor's petition or the barrister's presentation (as a debtor) of such a petition under section 55 of the Bankruptcy Act; or
- a barrister applying to take the benefit of any law (whether Australian or otherwise) for the relief of bankrupt or insolvent debtors, compounding with the barrister's creditors or making an assignment of the barrister's remuneration for their benefit.

A 'serious offence' is defined under section 6 of the LPUL as:

- an indictable offence against a law of the Commonwealth, a State or a Territory (whether or not the offence is or may be dealt with summarily); or
- an offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth, a State or a Territory if committed in Australia (whether or not the offence could be dealt with summarily if committed in Australia).

A 'tax offence' is defined under section 6 of the LPUL as any offence under the *Taxation Administration Act 1953* (Cth).

Pursuant to section 88 of the LPUL, barristers must give the NSW Bar Association:

- written notice that an automatic show cause event has occurred within 7 days after that event occurred; and
- a written statement explaining why, despite the show cause event, the barrister considers themselves to be a fit and proper person to hold a practising certificate within 28 days after the event occurred (or a longer period allowed by the NSW Bar Association (subject to rule 25 of the *Legal Profession Uniform General Rules 2015* (**General Rules**))).

## Designated Show Cause Event

While automatic show cause events are *automatically* triggered, designated show cause events are *only* triggered upon notice on the barrister by the NSW Bar Association under section 90 of the LPUL, alleging that:

- engaged in legal practice outside the terms of a condition restricting their practising entitlements (in the case of a holder of an Australian practising certificate); or
- provided legal services not permitted by or under the LPUL (in the case of a holder of an Australian registration certificate); or
- does not have, or no longer has, professional indemnity insurance that complies with the LPUL (in the case of a holder of an Australian practising certificate who is required to have professional indemnity insurance).

In responding to a notice issued under section 90 of the LPUL, the barrister must provide the NSW Bar Association a written statement within 28 days after service of the notice (or a longer period allowed by the NSW Bar Association, subject to rule 26 of the General Rules), pursuant to section 91 of the LPUL, to the following effect:

- showing cause why the NSW Bar Association should not take action, specified in the notice, to vary, suspend, or cancel the practising certificate; and
- explaining why, despite the show cause event, the barrister considers him or herself to be a fit and proper person to hold a practising certificate.

## Investigation of Show Cause Events Generally

Following notification of the show cause event, the Bar Council must determine whether the barrister is a fit and proper person to hold a practising certificate. In doing so, the Bar Council may, and usually does, conduct an investigation into this issue. The investigation into the assessment of whether the barrister is a fit and proper person is not confined in its scope to the basis of the show cause event. The onus is on the barrister who is subject of the show cause event to show that, despite the show cause event, he or she is a “fit and proper person” to hold a practising certificate. If the Bar Council determines that the barrister is a fit and proper person, it may still impose discretionary conditions that it considers appropriate in the circumstances.

## Section 51 Disclosures

A barrister’s practising certificate contains a statutory condition imposed by section 51 of the LPUL and rule 15 of the General Rules requiring that the barrister notify the NSW Bar Association in writing within 7 days of any of the following events:

- charged with or convicted of a serious offence<sup>3</sup> or a tax offence<sup>4</sup> (a conviction includes entering a plea of guilty, whether or not a conviction is recorded);

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<sup>3</sup> A serious offence means an offence that is an indictable offence against a law of the Commonwealth, a State or a Territory (whether or not the offence is or may be dealt with summarily) or an offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth, a State or a Territory if committed in Australia (whether or not the offence could be dealt with summarily if committed in Australia): s 6, *Legal Profession Uniform Law* (NSW).

<sup>4</sup> A tax offence means any offence under the *Taxation Administration Act 1953* (Cth): s 6, *Legal Profession Uniform Law* (NSW).

- convicted of a summary offence,<sup>5</sup> with exception to some summary offences under rule 15(3) of the General Rules arising under transport or traffic legislation as elaborated below (a conviction includes entering a plea of guilty, whether or not a conviction is recorded);
- a bankruptcy-related event<sup>6</sup> has occurred; or
- the barrister has been the subject of disciplinary proceedings as a lawyer in a foreign country.

Pursuant to rule 15(4) of the General Rules, a conviction for a driving/parking offence or summary offence under transport or traffic legislation does not need to be notified unless it is:

- an offence where the court has sentenced the barrister to a term of imprisonment;
- an offence that has a maximum penalty of imprisonment of 6 months or more;
- an offence where the court has ordered licence disqualification on conviction; or
- an offence, involving driving or operating a vehicle under the influence of alcohol or any other drug.

### Outcome of Section 51 Disclosures

The disclosure of a charge does not trigger a mandatory consideration of whether the barrister is a fit and proper person. However, it may lead to the making of a complaint by the Bar Council to the NSW Legal Services Commissioner (NSW), which will require investigation and determination. Alternatively, and without limiting any other power of the Bar Council, action may be taken under sections 82 to 84 of the LPUL including variation, suspension, or cancellation of the holder's practising certificate.

### Renewal Disclosures

The online application for renewal of a barrister's practising certificate requires disclosure of certain information, some of which – if the barrister has complied with the obligations identified under the show cause event provisions and/or section 51 – will already have been disclosed during the practising certificate year. However, the renewal process carries with it a wider obligation of disclosure. Specifically, at renewal, barristers are reminded of rule 13(1) of the General Rules and asked to address any matter raised by that rule which has not previously been disclosed to the NSW Bar Association. Rule 13(1) is largely self-explanatory and is not confined to the person's practice as a barrister.

### Outcome of Renewal Disclosures

Without limiting any other power of the Bar Council, it may refuse to renew an Australian practising certificate if it considers that the applicant is not a fit and proper person to hold the certificate as a result of a rule 13 disclosure.

<sup>5</sup> A summary offence means an offence against a law of the Commonwealth, a State or a Territory, other than a serious offence or a tax offence: r 15(5), *Legal Profession Uniform General Rules 2015* (NSW).

<sup>6</sup> A bankruptcy-related event, in relation to a person, means— (a) his or her becoming bankrupt under the *Bankruptcy Act 1966* (NSW) (or the corresponding provisions of the law of a foreign country or external territory); or (b) his or her being served with notice of a creditor's petition presented to a court under section 43 of the *Bankruptcy Act 1966* (NSW); or (c) his or her presentation (as a debtor) of a declaration to the Official Receiver under section 54A of the *Bankruptcy Act 1966* (NSW) of his or her intention to present a debtor's petition or his or her presentation (as a debtor) of such a petition under section 55 of that Act; or (d) his or her applying to take the benefit of any law (whether Australian or otherwise) for the relief of bankrupt or insolvent debtors, compounding with his or her creditors or making an assignment of his or her remuneration for their benefit: s 6, *Legal Profession Uniform Law* (NSW).

## **Consequences of Non-Disclosure**

Failure to provide the required written statement in response to an Automatic or Designated show cause event entitles the Bar Council to consider variation, suspension, cancellation, or refusal to renew the barrister's practising certificate.

Failure to comply with disclosure obligations under the LPUL is capable of constituting Unsatisfactory Professional Conduct or Professional Misconduct, pursuant to section 298 of the LPUL.

In some cases, the non-disclosure of an event will carry more serious consequences than the underlying conduct itself. For this reason, it is recommended that if a barrister is unsure of his or her disclosure obligations, the matter should be disclosed, out of abundant caution.

## **Further Questions**

If you have any questions, in the first instance please contact the Professional Conduct Department (**PCD**) of the NSW Bar Association on (02) 9232 4055 or by email marked for the attention of Ms Shar Doudman (Lawyer, Professional Conduct) at [pcd@nswbar.asn.au](mailto:pcd@nswbar.asn.au).

If the barrister requests, or PCD staff consider it appropriate, the barrister will be referred to Senior Counsel on the Professional Conduct Committees for ethical guidance.

Finally, it is appreciated that the underlying facts giving rise to a matter which might need to be disclosed, as well as any subsequent investigation, may also result in emotional and stressful challenges which might impact on the barrister's health, well-being, practice and other aspects of life. If a barrister requires any assistance – or is concerned that a colleague might require such assistance – members are encouraged to contact Ms Jenny Houen (Director, BarCare). Full details are available at <http://barcare.org.au/>. All contact with BarCare is treated in strictest confidence. No information is provided to the NSW Bar Association by BarCare unless the barrister expressly requests and permits BarCare to do so.

This factsheet is not to be taken as legal advice but is intended to provide guidance in relation to the provisions relating to disclosures. It is essential that barristers examine the disclosure provisions in detail.

*Last updated: 3 August 2020*